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FILED
JAN 10 1905

Supreme Court of the United States,

OCTOBER TERM 1904.

No. 411.

THE HAMBURG AMERICAN STEAMSHIP COMPANY,
Plaintiff in Error.

vs.

MINNIE GRUBE, as Administratrix of JOHN GRUBE, deceased,
Defendant in Error.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

October Term, 1904, No. 411.

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Brief for Plaintiff in Error on motion to dismiss or affirm.

STATEMENT.

The action in this case was brought in the New York Supreme Court by Minnie Grube, as administratrix of John Grube, against the Hamburg-American Steamship Company, to recover damages for the death of her husband, caused by a collision between the pilot-boat "James Gordon Bennett" and defendant's Steamship "Alene," August 17, 1901. The complaint alleges (p. 5, fol. 15) that the collision occurred "in the vicinity of the Scotland Light-ship and of the high seas,"

and that by the laws of the State of New Jersey, within whose territory and waters such collision occurred, a cause of action for damages, resulting from such death, was given to the administratrix of the deceased (p. 6, fol. 17). These allegations are denied by the answer (p. 8, fo. 24; p. 9, fol. 25), which avers (p. 9, fol. 25) that said collision occurred upon the high seas, outside the waters of the State of New Jersey. On these issues the parties went to trial. The plaintiff had a verdict and judgment which was reduced in amount and as reduced, affirmed on appeal by the Appellate Division of the Supreme Court of New York (pp. 60 and 61).

Under the Code of Civil Procedure of New York (Section 191) an appeal "from a judgment of affirmance in an action to recover damages for injuries resulting in death" cannot be taken as of right to the Court of Appeals. It may, however, be allowed by the Appellate Division, and application to that court was therefore made to allow an appeal in this case, but it was denied (p. 64.) An appeal in such cases may also be "allowed by a judge of the Court of Appeals." An application made in this case to the Chief Judge was refused "on the ground that the questions involved in the record were Federal questions and should be reviewed by the Supreme Court of the United States." (Record p. 64) The memorandum of Chief Judge Cullen upon denying the application is at page 65 of the record. Upon petition showing these facts, and upon the record in the New York Supreme Court, a writ of error was allowed by Mr. Justice Peckham (p. 67). The defendant in error now moves to dismiss this writ of error for want

of jurisdiction or to affirm because the decision below was obviously right.

In cases like the present such a certificate as that embodied in the record and already referred to, when followed by the allowance of a writ of error by a Justice of this Court, ought to be an answer to such an application as this. If the Chief Judge of the highest court of the State and a Justice of this Court both certify that the question in the record is a Federal question, the ultimate decision of which should be made by this Court, it would seem that the plaintiff in error should be entitled to a hearing at the bar of this Court.

Nevertheless, for greater caution, plaintiff in error submits the following reply to the motion.

POINTS.

First.

The complaint bases the cause of action upon a statute of the State of New Jersey giving the right of action for injuries causing death. This statute was put in evidence on the trial (pp. 14 and 15). No other statutes giving such cause of action were offered in evidence.

In reference to the place of collision considerable evidence was taken, which is not stated in full for the reason, as stated in the bill of exceptions, that "the Appellate Division held on the first appeal herein that the evidence on this subject was conflicting and properly submitted to

the jury" (p. 18, fol. 52; p. 34, fol. 100; p. 50, fol. 149). It is stated in the bill of exceptions that witnesses for the plaintiff indicated "that the point marked 'Alene and wreckage' and initialed 'A. R. M.' was the point of collision." This is less than three nautical miles from the nearest shore (p. 14, fol. 40). (See chart following p. 56). The bill of exceptions also shows that the defendant claimed that the collision took place at the point subsequently marked by the wreck buoy placed by the United States Government over the wreck of the *Bennett* (p. 34, fol. 100). This buoy is also shown on the chart and is outside the three mile limit. The black line, running from the Scotland lightship through the whistling buoy to Rockaway Beach, is the line fixed by the Secretary of the Treasury as that outside of which the international rules for preventing collision apply, and inside of which the inland rules shall be in force (p. 16, fol. 46).

The black line shown on the chart, running through the beacon on Romer's Shoal, and thence running seaward, is the boundary between New York and New Jersey. This was placed on the chart by plaintiff's attorney, but defendant claimed "that this boundary extends only to the main sea" and not further than a point northeast of the Hook beacon, (p. 14, fol. 41). The Court will notice that exceptions were taken to the admission of the opinions of various navigators as to where the collision occurred, but no evidence on this subject is set out in the bill of exceptions except that necessary to show the materiality of these exceptions. These exceptions cannot be reviewed in this court. What ought to be reviewed is the ruling of the court upon the motion of the

defendant below to direct the verdict for the defendant. This contains the two claims of right and immunity under the Constitution and statutes of the United States and their authority, which were denied by the State Court and which are the basis of the jurisdiction of this court. The motion to direct a verdict was denied and the defendant below excepted (pp. 50-52).

The two claims of right were as follows:

I.—That under the statute of the United States approving and ratifying the agreement between the States of New York and New Jersey, in reference to boundary between them, which was approved June 28, 1834 (4 U. S., Stat. at large, 708) it was mutually agreed that the jurisdiction of the States of New York and New Jersey on the seaboard should extend only "to the main sea."

This is the language of the agreement (p. 47, fol. 141; p. 48, fol. 142). It is also the language of the statute in which the argument is set forth. It follows that the State of New Jersey after ~~1848~~ 1834 had no jurisdiction over the main sea east of its coast line, and that the subsequent statute of 1848, giving a right of action for injuries causing death did not apply, when the injury and death occurred on the sea.

The merits of this contention will be briefly considered under the Tenth Point.

II.—That the effect of the cession of the Sandy Hook Peninsula by the State of New Jersey to the United States, and the purchase of the fee of the said Peninsula by the United States and of the use by the United States for military purposes of the littoral waters to the east of that peninsula for

a distance of eight miles, was to vest in the United States, under Article I, Sec. 8 of the United States Constitution, jurisdiction over those littoral waters exclusive of the State of New Jersey.

The Act of Cession was approved March, 1846 (p. 35). The Act of New Jersey, giving the right of action for injuries causing death, was not passed until March 3, 1848 (p. 14, fol. 42). The claim of the plaintiff in error is that this latter act had no application to the littoral waters to the east of the Sandy Hook Peninsula, that the jurisdiction of the United States over these waters was exclusive and that therefore the defendant was exempt from the operation of the Act of New Jersey of 1848. The merits of this contention will also be briefly considered later.

It thus appears that the record shows (pp. 50-52), that a claim of right under statutes of the United States and under the authority of the United States was made in the court below, that this claim was denied and that the plaintiff in error excepted.

Workman v. Mayor, 192 U.S. 673.
Nat. Mut. Ins. Co. v. Chester, 193 U.S. 635.

Second.

The only answer that the defendant in error makes to our contention is, that the court cannot judicially know how the jury found upon the subject of the place of collision because there was evidence tending to show that the collision might have occurred more than three miles from the shore.

1. This contention overlooks an elementary rule of pleading. When a plaintiff alleges existence of a certain fact and the defendant traverses it, the verdict constitutes a finding for the party in whose favor the jury decides upon this issue. It is only the issues in a case that are tried by the jury.

"The jury are bound to give their verdict for the party, who, upon the proof, appears to them to have succeeded in establishing his side of the issue."

Stephens on Pleading, 84.

Here the plaintiff alleged that the collision occurred in the waters of New Jersey (p. 6, fol. 17). This the defendant denied (p. 9, fol. 25). The bill of exceptions expressly states that on the trial plaintiff below claimed that she should recover if the collision happened within three miles of the shore and defendant below claimed the contrary (p. 14, fol. 40; p. 34, fol. 100). On this record the finding of the jury for the plaintiff establishes that the collision took place within three miles of the shore—the place which the plaintiff contended to be within the waters of the State of New Jersey and which the court below has held as matter of law to be within such waters, and this Court should decide this question of law which is the only one now presented on this record. This question is distinctly presented by motion to direct a verdict (pp. 51, 52, fols. 153 and 154).

No claim whatever was made by defendant in error, upon the trial, that she could recover because the *Bennett* belonged to a New Jersey corporation, and was therefore, by a legal fiction, New Jersey territory.

2. If the jurisdiction of the sovereign of the shore extends as far as the range of cannon (see *post*, p. 19) the question whether the collision happened within three miles of the shore is immaterial. The claim of exemption is drawn so as to cover this point (p. 51).

3. The contention that it cannot be judicially known what the verdict was upon this point, because the charge is not given, is frivolous. The rule of pleading referred to is as old as trial by jury, and prevailed before the statute authorizing bills of exceptions was adopted. But to guard against any possible misconstruction the bill of exceptions states (p. 52, fol. 154), that the charge "did not cover any of the points mentioned in the motion to direct a verdict."

Counsel for defendant in error is well aware that in another case growing out of the collision between the *Alene* and the *Bennett*, it was held to be the law of the State of New York that no right of action exists in that state for injuries causing death, if the injuries were caused and the death took place upon the high seas, outside the jurisdiction of any state whose statutes give a right for action for injuries causing death. He quotes on his brief (p. 19), the decision on this subject.

Lennan *vs.* Hamburg-American Steamship Company, 73 Appellate Division (New York), 357.

This decision was followed in the case at bar and is assumed to be correct by the decision of the Court of Appeals upon the first appeal (pp. 54-56). On the first trial the claims of the respective parties as to the place where the collision happened, were the same as on the second trial. In reference to these claims the Court of Appeals says in this decision (p. 55, fol. 163):

"One of the questions litigated was that of jurisdiction which depended upon conflicting evidence and which, upon the record before us the unanimous affirmance below has concededly and conclusively resolved in favor of the plaintiff."

This judicial statement does not relate to the Federal question, but to the question of fact on plaintiff's claim.

When this case was before the Court of Appeals on the first appeal there was no evidence in the record upon the Federal questions which are now, first presented to this court. This evidence had not then been discovered by the defendant below.

4. Counsel for defendant in error states, at page 18 of his brief, that the writ of error allowed by Chief Judge Parker in the Lennan case was dismissed by this Court "because the claim of plaintiffs in error was not properly set up." It is surprising that counsel should make a statement in regard to so recent an occurrence which is obviously untrue and can only discredit the brief containing it. The memorandum handed down by this court upon that motion (194 U. S. 629) states that the writ of error was dismissed "for the want of jurisdiction." The cases cited show that this was on the ground that questions of fact as to the alleged negligence of defendant were involved which this Court could not review. In the Lennan case also the facts raising the Federal questions involved in this case had not been discovered when the issues were tried. The defendant below sought on that writ of error to review the rulings upon the merits of the case; that is to say, upon the applicability of the col-

lision rules to the facts of the case and the construction of these rules. But inasmuch as this Court held that there was so much conflicting evidence on these questions that it had no jurisdiction to review the decision in the State Court, the defendant below has omitted from the bill of exceptions in the present case the evidence upon this subject, except so much as was necessary to present certain other exceptions to evidence which the State Court has finally disposed of. The case now comes before this court solely upon the question whether, under various statutes of the United States bearing upon the subject and under the Constitution of the United States, its claim to be exempt from the authority of the statute of New Jersey, passed in 1848, giving a right of action for injuries causing death, upon which, as distinctly appears by the bill of exceptions, the plaintiff below rested her case, can be sustained.

In short counsel for plaintiff in error, having in vain endeavored to obtain a hearing in this Court upon the merits of this case, under the rules of navigation; now seeks to review the judgment upon the question not heretofore raised in this Court, of its right under the Constitution and laws of the United States to be free from the operation of the statute of New Jersey, upon which the right of action is sought to be sustained.

Third.

Defendant in error alleges as one ground for

the motion to affirm "that the writ of error herein was taken for delay only." This untrue and unwarranted statement counsel for the plaintiff in error contents himself with absolutely denying.

Fourth.

The questions presented on this record are on their face of such importance that they ought to be fully discussed at the bar of this court. They involve the construction of the Constitution of the United States and of Federal statutes which have never been judicially passed upon, and which are manifestly of national importance. If, notwithstanding the Act of Cession and the purchase of the fee of the peninsula by the United States, the State of New Jersey still has jurisdiction over the waters to the east of the Sandy Hook Peninsula, what is to hinder it from prohibiting officers of the United States from firing shot and shell over these waters? What is to hinder it from erecting an artificial island there, as the State of New York has done in New York Bay, and using this for state purposes.

It is believed that the Court will not consider these questions now, but will reserve them for further examination. Nevertheless, for greater caution, plaintiff in error submits the following argument on the merits:

Fifth.

It is plain upon the record that whether the collision occurred outside or inside the three-mile limit it took place on the ocean, and to the eastward of the Sandy Hook peninsula. Exclusive jurisdiction over these littoral waters is vested in the United States.

In support of this proposition defendant relies on the following:

United States Constitution, Art. 1, Sec. 8, gives Congress power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of Forts, Magazines, Arsenals, Dockyards and other needful buildings."

The Act of Congress of March 20th, 1794 (1 U. S. Stat. at L., 345), which is not mentioned in the brief for defendant in error, authorizes the fortification of the harbor of New York, under the direction of the President, and authorizes the President to receive from any State a cession of land for the purpose, or where such cessions shall not be made, to purchase such lands on behalf of the United States.

The Act of Congress of 1804 (2 U. S. Stat. at L., 294) directs the Secretary of the Treasury as soon as the fee of the soil should have vested in the United States to cause a beacon to be erected on the north point of Sandy Hook (p. 36, fol. 106).

A deed executed February 26th, 1806, conveys

to the United States the northern point of the Sandy Hook peninsula (pp. 36-38, fols. 106-115).

Another deed executed June 17th, 1817, conveys to the United States the land south of the first parcel and extending to the narrow neck of land at the southern end of the peninsula (pp. 39-46, fols. 115-137). The south boundary of the ceded peninsula is marked "Old United States Boundary" on the chart, and it was stipulated between the parties that this is the boundary mentioned in the Act of Cession (p. 46, fol. 138). The most casual inspection of the chart will show that the place of collision was within the littoral waters to the east of the ceded peninsula.

The Act of Congress of April 28th, 1828 (4 U. S. Stat., at L., 264), re-enacted in Section 1838, U. S. Rev. Stat. (which also is not mentioned in the brief for defendant in error), authorizes the President "to procure the assent of the Legislature of any State within which any purchase of land has been made for the erection of forts, magazines, arsenals, dock yards and other needful buildings, without such consent having been obtained."

Pursuant to this Act, the consent of the State of New Jersey to the purchases before mentioned, was obtained in 1846. The Act approved March 12th, 1846 (N. J. Laws of 1846, p. 124), ceded to the United States jurisdiction over the Sandy Hook Peninsula, which had thus been purchased (p. 35, fols. 103-105).

It was proved on the trial by the uncontradicted evidence of Major Birnie, that since 1878, the Government of the United States has used the Sandy Hook Peninsula for cannon practice, practically daily (pp. 48, 49, fols. 144-145), and that the firing has extended from the shore to the

northward and eastward of Scotland Lightship to a distance of eight miles.

Sixth.

The effect of the above statutes and deeds was to vest in the United States title in fee to the Sandy Hook Peninsula and exclusive jurisdiction over it.

1. The Constitution of the United States lays down three prerequisites to the exclusive jurisdiction conferred by the paragraph quoted above: There must be purchase by the Federal Government, consent by the State, and the purpose must be the erection of forts or other needful buildings.

United States *v.* Tucker, 122 Fed. Rep., 518.

These requisites were complied with.

(a.) The President, duly authorized by the Acts of Congress of 1794 and 1804 (*supra*), obtained a conveyance of the peninsula, which was made by the deeds above referred to. It was a "purchase", for, as the deeds recite, a money consideration was paid—$3,750 in the first case, and $20,000 in the second. Upon the delivery of these deeds the United States owned this land in fee.

(b.) The consent required by the Constitution was obtained in 1846 by the Act of New Jersey referred to above.

The fact that this consent was subsequent to the purchase is immaterial as shown (if authority for such a proposition be needed), by the case of

United States *v.* Tucker, 122 Fed. Rep., 518.

The Court there points out (p. 522) that although the Act of August 16, 1892, was not passed until some years after the United States had acquired the land described in the indictment, still the consent of the State to the purchase was thereby given. The New Jersey Act of 1846 expressly recognizes the fact that the land was "owned by the United States." It expressly enacts what the Federal Constitution would accomplish independently of it, that "the jurisdiction in and over all that portion of Sandy Hook * * * owned by the United States * * * be and the same is hereby ceded to the said United States, for military purposes * * * "

(c) It cannot be disputed that this purchase was made and consented to for the purposes contemplated by the Federal Constitution or that the tract in question has always been and is now used for those purposes. This fact is recognized by the Act of Cession itself. Those purposes are expressly set forth in the Acts of Congress, above cited, authorizing the purchase and the acceptance of the cession. Major Birnie's testimony sets the matter beyond all question.

2. It remains to consider the effect of such purchase and consent under the United States Constitution. The leading case on this subject is Ft. Leavenworth, &c. R. R. Co. *v.* Lowe, 114 U. S., 525. In that case it appeared that the Constitutional requirements had not been complied with, for the United States acquired title to the Fort Leavenworth military reservation by purchase before, not after, the admission of Kansas to the Union. After Kansas became a state the United States continued to own this tract of land,

but the Act of Congress admitting the state made no reservation of the jurisdiction of the United States over it, and this was therefore held to have been ceded to Kansas. An Act of the Legislature of Kansas was subsequently obtained, ceding to the United States jurisdiction over the reservation; but it was held that inasmuch as this Act was the sole source of the authority of Congress over the tract in question, the State could limit the grant, and that its reservation of the power to tax a railroad passing through it, was, therefore, valid. The Court, however, was unanimous in saying that wherever land is purchased by the United States within the limits of an existing State, and with the consent of the Legislature, the jurisdiction of Congress, under the Constitution, is exclusive. The case contains a full discussion of the entire question. It sums up the constitutional doctrine as follows (p. 532 *et seq.*):

"When the title is acquired by purchase by consent of the Legislatures of the States, the Federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of exclusive legislation in all cases whatsoever. Broader or clearer language could not be used to exclude all other authority than that of Congress, and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and of the Attorneys General.

* * * * *

"When, therefore, a purchase of land for any of these purposes is made by the national government, and the State has given its consent to the purchase, the land so purchased by the very

terms of the Constitution *ipso facto*, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State Legislature is by the very terms of the Constitution by which all the States are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place."

S. P. Story, Constit., Sec., 1227.
In re Ladd, 74 Fed. Rep., 31.
United States *v.* Tucker, 122 Fed. Rep., 518.
Commonwealth *v.* Clary, 8 Mass., 72.
United States *v.* King, 34 Fed., 302.

As the States have no longer legislative power over these military tracts, so their inhabitants have none of the rights of citizens of the States to which they originally belonged.

Sinks *v.* Reese, 19 Ohio St., 306.
Opinion of the Justices, 1 Metcalf (Mass.), 580.
Commonwealth *v.* Clary, 8 Mass., 72.
6 Opinions U. S. Attys. General, 577.

It is hardly necessary to dwell at length on the practical reasons which underlie the constitutional provision quoted above, and which have led the Courts to sustain the Federal jurisdiction as exclusive whenever possible. In the apportionment of powers between the State and Federal governments, the latter is to exercise those of peculiarly national character, prominent among which is that of making war. By the Constitution, Congress is given power to "declare war" (Art.

I, Sec. 8, Par. 15); "to raise and support armies" (Art. I, Sec. 8, Par. 16); the States are forbidden "without the consent of Congress" to "keep troops or ships of war in time of peace," or to "engage in war, unless actually invaded, or in such imminent danger as will not admit of delay" (Art. I, Sec. 10, Par. 3). The design of the Constitution was to leave the Federal Government free in its conduct of military matters, untrammelled by State interference, and accordingly it provided a means for the acquisition by the Federal Government of the land necessary for military purposes, and then put that land beyond the reach of restrictive State legislation by giving to Congress the power "to exercise exclusive legislation in all cases whatsoever." Thus the territory used for military purposes is given precisely the same protection from State interference as that accorded to the seat of Federal Government, the District of Columbia, where it is obvious that no interference by the States could be tolerated. In the Fort Leavenworth case the practical necessity of these provisions is shown by a quotation from the Federalist:

"The public money expended on such places and the public property deposited in them require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it."

3. The act of New Jersey in the case at bar is perfectly definite in its terms. It is an absolute cession of "the jurisdiction" over Sandy Hook. Such an Act is inconsistent with any legislative power remaining in the State. The State had

jurisdiction; it ceded it; how can it be claimed that jurisdiction still remains in the State? Such cessions, even when outside the constitutional provision, are in general treated by the courts as analogous to the purchases under the Constitution. The practical reasons in favor of an exclusive federal jurisdiction are equally applicable, and the cases accord to the United States the same jurisdiction over places thus ceded by States as over those purchased by the consent of a State, in so far as the particular act of cession does not expressly restrict it.

United States *v.* Carter, 84 Fed. Rep., 622.

Seventh.

The jurisdiction over Sandy Hook acquired by the United States included the littoral waters lying to the eastward.

That littoral waters within three miles of a maritime frontier are subject to the jurisdiction of the sovereign of the shore, is now too well settled to admit of doubt.

Wheaton thus states the rule in his International Law, Sec. 177:

"The general usage of nations superadds to this extent of territorial jurisdiction the distance of a marine league, or as far as cannon shot will reach from the shore along all the coasts of the State. Within these limits its rights of property and territorial jurisdiction are absolute and exclude those of every other nation."

Wheaton uses the word "State" here in the sense of nation. He is not dealing with the States of the American Union, but with the States composing the great family of nations.

R. H. Dana's note (105) to the same section quotes numerous writers who all recognize the jurisdiction as "the power of regular and effective instruments of war." He quotes Bynkershoeck: "*Terrae potestas finitur ubi finitur armorum vis.*"

Authorities learned in international law affirm that the effect of the increase in the range of projectiles is to extend the exclusive jurisdiction of the sovereign of the shore.

Pomeroy on Int. Law, § 144.
Hautefeuille, Droits des Nations Neutres, vol. 1, pp. 53, 54.

No doubt the jurisdiction of New Jersey during the interval between independence in 1776 and the adoption of the Federal Constitution, extended to the three-mile limit. But the Federal Constitution authorizes Congress to regulate commerce between the States and with foreign nations (Art. 1, Sec. 8); to define and punish piracies and felonies committed on the high seas (Art. 1, Sec. 8) and extends the judicial power of the Federal Courts "to all cases of admiralty and maritime jurisdiction" (Art. III, Sec. 2). Under this grant of power, Congress had jurisdiction over these littoral waters. This power was exercised by Congress in adopting rules for the navigation of vessels upon these waters (p. 15), which are in evidence, and which were originally adopted April 29th, 1864 (Vol. 13 U. S. Stat. at L., p. 58). They were subsequently codified in U. S. Rev.

Stat., Sec. 4233, and have since been adopted in amended form by the act approved June 7, 1897 (p. 15, fol. 43).

In addition to this, Congress as long ago as 1790, passed Acts for the punishment of crimes committed "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States." These Acts are codified in Chap. 3, Title 70, U. S. Rev. Stat., Secs. 5339, to 5391. Sect. 5391 provides especially for offenses "committed in any place which has been, or may hereafter be ceded to, and under the jurisdiction of, the United States."

Some of these sections apply only to places within the exclusive jurisdiction of the United States; others apply to places over which the United States exercises jurisdiction concurrent with that of a particular State.

This then was the situation in the case at bar:

The United States Government had bought the fee of the peninsula at the entrance to the most important harbor within the United States. It had already jurisdiction concurrent with the State of New Jersey over the sea to the eastward of this point. It was buying the peninsula for military purposes, in order to erect batteries which should control the sea to the eastward. Jurisdiction, exclusive of the State of New Jersey, over the littoral waters would be essential to the value of the grant.

The New Jersey Act, which, as shown above, gave to the United States exclusive jurisdiction over the peninsula of Sandy Hook passed the same jurisdiction over the littoral waters.

Ex parte Tatem, 23 Fed. Cas., 708; S. C., Hughes, 588.

1. This result is merely an application of the familiar rule of international law quoted above—that the jurisdiction of a sovereign extends over the littoral waters. Its application to a fortified strip of land ceded for military purposes is, however, peculiarly appropriate because the three-mile limit had its origin in the control given over the littoral waters by fortifications on the shore. It makes little difference whether we consider that the jurisdiction over littoral waters of Sandy Hook passed as part of or as a necessary incident to the cession of the peninsula itself. Nations have jurisdiction of littoral waters because they are sovereign over the shore. New Jersey originally included the waters off Sandy Hook because New Jersey included Sandy Hook itself. When Sandy Hook is ceded to a new sovereign, that sovereign by parity of reasoning controls those waters. The incidental jurisdiction over the waters cannot remain when the principal on which it depended is gone.

Had this cession been made by the United States and New Jersey to a foreign government, it would clearly carry with it the littoral waters. When Great Britain recognized the independence of the United States, she ceded her sovereignty over the waters within three miles of the coast. The cessions to the United States of Alaska and of Florida included their littoral waters. This is the usual effect of cession to a new sovereign. That the sovereignty of the United States is absolute within its sphere is too well settled to require argument. This sphere, by the express mandate of the Constitution, includes the power of exclusive legislation over tracts of land, purchased for military purposes with the consent

of the State. Its dominion over them is therefore that of an absolute sovereign, and as such it controls the littoral waters as any other sovereign would. There is nothing in our theory of government to prevent the application of the usual rule of international law.

2. Not only does the general rule of international law favor the defendant's contention, but the special circumstances under which these military tracts are created lend it peculiar force. As has been indicated above, the object of the constitutional provision for Federal military tracts was to centralize the means of national defense and to unify the legislation which might affect them. The grant to the United States of exclusive legislative power is one to be broadly construed for the realization of its intended objects. A construction which tends in any degree to obstruct those objects or to diminish the freedom of the Federal Government is to be avoided. The objects to be attained were avowedly two—the protection of the harbor of New York (1 U. S. Stat. at L., 345) and the erection of a lighthouse on Sandy Hook (2 U. S. Stat. at L., 249). Both of these objects are "public purposes" within the meaning of the New Jersey act of cession and both are included in the words of the Constitution "for the erection of forts * * * and other needful buildings." Realization of each of these objects requires control of the water. The United States take Sandy Hook as Great Britain did Gibraltar, to use it as a strategic point. Constant target practice is carried on over the waters to the eastward, as is shown by the uncontradicted evidence of Major Birnie. He testifies that the range for artillery

practice extends over these waters to a distance of about eight miles to the eastward; that the Scotland Lightship is a little to the east or southeast of the firing point, and that the firing continues over a range of about 45° from that toward the east and north (pp. 48, 49, fols. 144, 145, 146). Undisputed dominion of the region surrounding such a point is as clearly necessary to its strategic value in the case of Sandy Hook as in that of Gibraltar. Could it be tolerated for a minute that New Jersey should regulate the waters or fisheries off Sandy Hook so as to impede the Government target practice. Or that it should allow the construction of artificial islands or buildings off the shore which would hamper military operations and obstruct the light from the lighthouse? Or that it should enact a law throwing the burden of proving absence of negligence on the United States in cases where damage was caused by the target practice? Can it be said that when a nation acquires land for *military purposes,* that nation cannot exercise control over the waters adjoining that land? Will the Court hold that the long-continued use of the waters for target practice is a violation of New Jersey's sovereignty?

There is a manifest absurdity in claiming that the ocean waters to the east of Sandy Hook are the domain of a sovereign different from that of the land. It can not be that New Jersey can legislate for the water but not for the land; that while the inhabitants of Sandy Hook are not citizens of New Jersey and voters there, those of a lightship moored off the shore are. The practical inconvenience of such results is analogous to that which gave rise to the presumption that conveyances between private parties, bounding on a road

or stream, pass to the centre—namely, that the existence of little detached strips or gores claimed by a person other than the abutting owner would be a source of endless confusion and complication of title.

Jurisdiction over these waters is vital to the United States; it is a matter of indifference to New Jersey. The waters do not wash her shores. She is not affected by what happens on them. How can it be said that New Jersey intended to reserve a jurisdiction so useless to her, so vital to the United States?

3. To realize the particular object of this cession, control of the waters is peculiarly necessary. It would be difficult to put a case which better illustrates the wisdom of the doctrine that "when the use of a thing is granted, everything is granted by which the grantee may have and enjoy the same."

Kent's Comm., 467, note g.
United States *v.* Appleton, 1 Sumner, 492.

In this case Judge Story held that the right to swing a door over a court adjoining the building conveyed to the defendant, passed as incident to the grant. At p. 500, he says:

"It is implied from the language of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in use and belonged to the defendant."

And again at p. 503:

"Whatever are proper incidents and appurtenances of the grant will pass without the word 'appurtenances' by mere operation of law."

To the same effect are:

Potter *v.* Boyce, 73 App. Div., 383; aff. 176 N. Y., 551.
Huttemeier *v.* Albro, 18 N. Y., 48;
Richardson *v.* Bigelow, 15 Gray (Mass.), 154.

In Voorhees *v.* Burchard, 55 N. Y., 98, the rule was stated that "some things pass by a conveyance of lands as incidents appendant and appurtenant thereto, though not named therein." And the court remarked that "a deed purporting to convey by metes and bounds, may be legally construed, in the light of surrounding circumstances, to include also privileges annexed to, or connected with the main subject of the grant."

To the same effect is Simmons *v.* Cloonan, 81 N. Y., 557. In this case it was held that the incident need not be absolutely essential to the use of the parcel of land specifically mentioned in the deed; it is enough if full enjoyment of the property could not be had without it.

This rule is applied in cases similar to that of the case at bar.

Ex parte Tatem, 23 Fed. Cas., 708; S. C., 1 Hughes, 588.

This case involved the jurisdiction of the United States over a crime committed on board a vessel lying at a wharf in the United States Navy Yard near Portsmouth, Va. By certain acts of the Virginia Assembly and by certain deeds, exclusive jurisdiction over "the public lands known by the name of Gosport, and certain lands immediately opposite "had been ceded to the United States "for the purpose of a navy yard." It was con-

tended that the jurisdiction ceded did not include the littoral waters. The court held the contrary, saying:

"By navy yard is meant not merely the land on which the Government does work connected with ships of the navy, but the waters contiguous necessary to float the vessels of the navy while at the navy yard."

5. Defendant in error relies upon the decision of Middleton *v.* La Compagnie Generale Transatlantique, 100 Fed. Rep., 866. In this case, however, the injury happened not in the waters to the east of the peninsula, forming part of the main sea, but in the inner bay. The Court expressly makes this distinction. Judge Lacombe says (p. 867):

"We have then a case which deals, not with the strip of ocean which extends seaward from a maritime frontier, but with waters wholly inland, where ownership and jurisdiction are distributed between the abutting territory according to the domestic laws of the country within which such waters lie. Such distribution in the case at bar, may be ascertained, not by any discussion of ancient charters, or by any extended analysis of the principles governing riparian boundaries. It has been settled expressly and positively by the conjoint action of the only three political powers which could by any possibility be held entitled to exercise jurisdiction over such locality. The States of New York and New Jersey and the United States of America, have legislated in harmony."

The learned judge then cites the acts before quoted. He proceeds also to call "attention to the circumstances that it nowhere appears in the record that the United States purchased Sandy

Hook," that the accident happened upon waters, which were within the limits of the State, conceded to be so by neighboring State, and by the United States, before the act of cession, and that the act, therefore, does not purport to transfer the locality in question.

In this same case Judge Lacombe says (p. 867):

"Certainly it may be expected that every maritime nation will insist upon the control of its own coast waters, to the extent to which it is able to dominate them from the shore."

Eighth.

The effect of the transfer of jurisdiction over Sandy Hook and the adjacent waters was to deprive the State of New Jersey of power to legislate for that region, and hence the Death Act of New Jersey, which was passed subsequent to the cession can have no operation here.

1. Before the act of cession, Sandy Hook was subject to the common and statute law of the State of New Jersey. We do not contend that the cession operated *ipso facto* to abrogate this body of law. On the contrary, it is well recognized that change of sovereignty over territory does not *ipso facto* work a general change of the law then existing.

Halleck Int. Law, chap. 34, sec. 14.
American Ins. Co. *v.* Canter, 1 Peters, 511, at 542.
Commonwealth *v.* Chapman, 13 Metcalf (Mass.), 68.
Chappell v. Jardine, 51 Conn., 64.

The same doctrine is applied to cessions by particular States to the United States for military purposes.

Chicago and Pacific Ry. Co. *v.* McGlinn, 114 U. S., 542; 29 L. Ed., 270.
Barrett *v.* Palmer, 135 N. Y., 336.
Madden *v.* Arnold, 22 App. Div., 240.

2. The act of cession was in 1846. The New Jersey statute giving a right of action for death by wrongful act was approved in 1848. This act is no more operative upon the Sandy Hook peninsula than is the legislation of the State of Maryland enacted after the cession of the District of Columbia operative in that District.

The effect of such a cession is to subject the territory ceded, to the United States as its sovereign and to sever all further political relation with the State of which it was formerly a part.

Madden *v.* Arnold, 22 App. Div., 240.

Thenceforth all legislation must be by the new sovereign, the United States, and New Jersey is utterly without power to enact new laws for this territory.

In re Ladd, 74 Fed. Rep., 31.
Mitchell *v.* Tibbets, 17 Pick. (Mass.), 298.
Commonwealth *v.* Clary, 8 Mass., 72.

In the Ladd case a tract of land was occupied by the United States for military purposes and had been ceded by the State of Nebraska. Sub-

sequently to this cession, an act of that State forbade the sale of liquor without a license and under it the officer in charge of the post exchange at this military reservation was prosecuted. It was held, upon *habeas corpus* from a Federal Court, that the act of Nebraska was inoperative upon the tract of land in question. The Court says:

"No extended argument is needed to show that it was wholly without the power of the State of Nebraska to thus limit the completed cession of jurisdiction created by the act of March, 1887. When the latter act took effect the legislative jurisdiction of the state over the reservation was wholly ceded to the United States, and until the exclusive jurisdiction thus acquired by the United States is terminated, either by the United States ceasing to own and occupy the reservation, or by the United States retroceding its exclusive jurisdiction to the State, the latter is without legislative power over the reservation."

In Mitchell *v.* Tibbetts, *supra,* land had been purchased by the United States with the consent of the State of Massachusetts for the Charlestown navy yard. The act of cession was in 1800. In 1822 the State legislature passed an act requiring vessels transporting stone within the state to comply with certain formalities. The act was held inapplicable to a vessel engaged in carrying stone between a port in the State of Maine and the Navy Yard. "* * * we are of opinion," says the court, "that the law of Massachusetts on which this action is founded did not extend to and operate within that territory, and that consequently this vessel was not employed within this Commonwealth within the meaning and construction of the act."

So in Contzen *v.* United States, 179 U. S., 191, it was held that after the annexation of Texas to the United States, the laws of the latter as to naturalization were in force in Texas, and not those of that Republic.

Ninth.

The New Jersey Act of cession contains nothing at variance with the propositions advanced above.

1. It is true that the act of cession provides that "the jurisdiction ceded * * * shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this state, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract."

Provisions similar to this have frequently been the subject of judicial consideration. They are customary, if not universal, in cessions by states to the Federal Government, and are held not to infringe the power to "exercise exclusive legislation" conferred by the Constitution. In the leading Ft. Leavenworth case, this Court says (p. 533, L. ed., p. 267):

"The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice."

To the same effect are:

United States *v.* Cornell, 2 Mason, 60; S. C., 25 Fed. Cas., 646.
United States *v.* Meagher, 37 Fed., 875.
Lasher *v.* State, 30 Tex. App., 387.

2. It is also true that the act of cession provides that "the jurisdiction ceded" shall not "prevent the operation of the public laws of this state within the bounds of the said tract, so far as the same may not be incompatible with the full use and enjoyment of the said premises by the United States for the purposes above specified." This is a statutory statement of the principle above stated —that change of sovereignty does not work a change of law. The provision refers to the public laws in force at the time of cession and is not to be construed as embracing any future legislation which the State of New Jersey may enact.

United States *v.* Hammond, 1 Cranch C. C., 15; S. C., 26 Fed. Cas., 96.

This case raised the same question and came up under the same paragraph of the Constitution as the case at bar. It was an indictment for theft committed in that part of the District of Columbia which was ceded to the United States by Virginia. The Virginia Assembly had passed an act making a cession of the territory in it the following clause:

"Provided that the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine

until Congress, having accepted the said cession, shall by law provide for the government thereof under their jurisdiction, in manner provided by the article of the Constitution before recited."

It was contended that this clause prevented the federal jurisdiction from attaching until Congress should enact the legislation indicated. The Court, however, held that the only effect of the clause was to stipulate "that the laws of Virginia, as they should exist at the time of the actual transfer of the jurisdiction should remain in force as law until Congress should otherwise provide, under their jurisdiction," that jurisdiction passed to the United States in spite of the clause quoted, and that the ceded territory was subject only to the laws of Virginia existing at the time of the cession.

3. To demonstrate the correctness of this conclusion, it is necessary only to look at the results which a contrary construction would involve.

The Federal Constitution provides that purchase by the United States for military purposes with the consent of the State shall give Congress the power of exclusive legislation. Therefore if a State attempts to give the consent required by the Constitution and at the same time to limit by provisions inconsistent with the exclusive legislative power of Congress, one of two results must follow. Either the limiting provisions are void as conflicting with the Constitution, or else the whole consent is totally invalid under the Constitution because not unrestricted as the Constitution requires. The latter result would seem forbidden by the maxim which requires construction *ut res magis valeat quam pereat,* and by the further rule

that a reservation in a deed, repugnant to the grant, is void.

It may, however, be contended by the plaintiff that even though a construction of this provision so as to allow legislation by the State of New Jersey would invalidate the act as a consent under the Constitution, still the act may operate as a qualified cession independent of the Constitution. That such cessions may be made is undoubted. But even under this view it is impossible to construe the clause in question as permitting legislation by New Jersey subsequent to the cession. That construction takes away with one hand what has just been given with the other. It is meaningless to cede to the United States "jurisdiction in and over" Sandy Hook, but to provide that New Jersey shall continue to have jurisdiction to enact legislation for that peninsula. This contradiction is like that which the court in the Hammond case points out:

"Then the Legislature would in effect say that we cede to the Congress and government, of the United States a certain district, the full and absolute jurisdiction over which shall vest in Congress as soon as the said district shall become the seat of government of the United States; provided, nevertheless, that the said jurisdiction shall not vest on the happening of that event, but on a subsequent act which is to be done by Congress under and by virtue of the jurisdiction which we transfer. The absurdity of this construction is evident."

The power of legislation is a function of sovereignty; jurisdicion also belongs to sovereignty. It is impossible to say that New Jersey has the former and the United States the latter. The

Court will not adopt a construction which renders the act of cession inconsistent with itself.

"No repugnancy or absurdity shall be presumed especially in a statute, if the words will bear such a construction as to avoid it. All instruments and statutes shall be so construed *ut res magis valeat quam pereat.*"

U. S. *v.* Hammond, *supra,* p. 17.

Moreover, if these broad rights of sovereignty over Sandy Hook are still New Jersey's, why was it necessary to insert a special proviso that New Jersey could still serve her process therein? All these difficulties and inconsistencies are avoided if the clause under discussion be given its natural meaning—a statement of the well-recognized principle of international law that territory ceded by one sovereign to another carries with it the existing body of law as of the time of cession.

4. The proposition that the clause refers to the body of law existing at the time of cession is further sustained by the uniform rule in the construction of statutes, that descriptive matter therein must refer to things as they existed at the time of its passage.

In McConihay *v.* Wright, 121 U. S., 201, 205, it was held that the clause in the Judiciary Act of 1789, giving the Federal Courts equity jurisdiction in cases where there is no adequate remedy at law, referred to the remedy as it existed at the time the Act was passed; and that, therefore, the Federal Circuit Court in West Virginia would still retain equity jurisdiction, although an Act of that State had subsequently been passed, giving the Courts of Common Law jurisdiction in the same class of cases.

So in Morris Canal Co. *vs.* The State, 24 N. J., Law, 62, the charter of the Canal Company required it to build a bridge at its own expense "when the canal shall cross any road." The Court held this meant any road existing at the time the canal should be built, and did not apply to a road subsequently laid out.

This decision is especially to be regarded because it is a decision of the Supreme Court of the State of New Jersey, and it is a statute of that State that is now under construction.

S. P. Griswold *v.* Atlantic Dock Co., 21 Barb., 225.

Tenth.

Under the Act of Congress ratifying the boundary agreement between the States of New York and New Jersey, the boundary of the latter State extends only to the main sea,—that is to low water mark along the coast.

This proposition was one of the grounds upon which the defendant based its motion to direct a verdict, which was denied by the trial judge (pp. 50, 51, 52, fols. 150, 151, 154). The boundary between the two States was fixed in 1834 by an agreement between commissioners of the respective States (pp. 47, 48, fols. 139, 143).

"The boundary line between the two States of New York and New Jersey * * * shall be the middle of said river (the Hudson) of the Bay of New York of the water between Staten Island

and New Jersey, and of Raritan Bay *to the main sea.*"

This agreement was adopted by statutes of New York and New Jersey.

Chap. 2, Gen. Laws N. Y., Sec. 7, 1 Heydecker's Ed., 69.
3 Gen. Stats. of N. J., 3464.

This agreement was ratified by Congress June 28, 1834 (p. 47, fol. 139).

4 U. S. Stats. at L., 708.

It was invalid until so ratified.

Constitution United States, Article I, Section 10.

The effect of this statute of the United States was to vest in the United States jurisdiction over the littoral waters to the south and east of the coast line of New York and New Jersey.

1. The statute and the agreement provide that this line shall run "to the main sea" (p. 47, fol. 141; p. 48, fol. 142). These are technical words and it is well settled that when the phrase "main sea" or its equivalent "high seas," is used, it means the ocean from low water mark.

To use the language of WOOD, V. C., in

General Iron Screw Co. *v.* Schurmans, 1 J. & H., 180;

"There can be no possible doubt that the water below low water mark is part of the high seas."

Statutes of the local authorities do not have any force within this three-mile limit unless expressly so stated in the statute. This was so held by the Privy Council in

The *Saxonia*, 1 Lushington's Admiralty Rep., 410.

In the leading case of The *Franconia*, Regina *v.* Keyn, L. R., 2 Exchec. Div., 63, it was settled after the fullest consideration, that the British criminal law did not, in the absence of an Act of Parliament, extend to a foreigner committing a criminal act in the British Channel within three miles of the coast of England.

At page 230 Mr. Justice LUSH says:

"All beyond low water mark was part of the high seas."

S. P.: U. S. *v.* Kessler, Baldwin Rep., 15, 35.

It is therefore obvious that the statutes of New York and New Jersey fix the line of jurisdiction of these two States quite irrespective of the three-mile limit, and do not extend it to that part of the high seas within this limit. The consideration of that limit is therefore unimportant. These States have left the jurisdiction of the littoral waters forming part of the high seas to the United States Government, and there it properly belongs.

2. The Appellate Division in Lennan *v.* Hamburg-American S. S. Co., 73 App. Div. (N. Y.), 357, treats Regina *v.* Keyn, as overruled. But the learned Court failed to observe that however the judges in that case differed as to whether a general Act of Parliament would apply to a crime committed within the three-mile limit, they all agreed that these littoral waters were part of the "high seas."

Mr. Justice LUSH has already been quoted. At p. 151, KELLY, C. B., uses similar language:

"The high seas, that is to say, all the whole seas of the world below low water mark."

All the text writers support the same proposition, and Blackstone's language proves that the words "main sea" were used as synonymous with the words "high sea."

In his Commentaries, Vol. I, p. 110, he says:

"*The main or high seas* are part of the realm of England, for thereon our Courts of Admiralty have jurisdiction as will be shown hereafter, but they are not subject to the common law. This *main sea begins at the low water mark.*"

To the same effect are Bouvier, Law Dict., title "High Seas."

Coulsford and Forbes on Waters, 11.
United States *v.* Ross, 1 Gallison, 624.

3. The agreement ratified by Congress shows on its face that it was drawn by eminent lawyers, one of whom Benjamin F. Butler, soon after became Attorney General of the United States, and had been one of the revisers of the statute law of the State of New York. Another, Lucius Q. C. Elmer, was the author of the Digest of the Laws of New Jersey. Both of these distinguished men were familiar with legal terms. If it had been their intention in drawing the agreement between the States to maintain the old jurisdiction of their respective States over the littoral waters within the three-mile limit, they certainly would have said so. The Legislatures of the two States and Congress certainly would have used language apt for this purpose.

When at a later date the treaty was negotiated

which gave the United States jurisdiction over the Panama zone, it was expressed that jurisdiction should extend to a line distant "three marine miles from mean low water mark."

Article II of the Treaty, U. S., Stat. at Large, 1903-04, p. 149 of Treaties.

Eleventh.

Defendant in error claims under the second point of the brief that she was in any case entitled to recover because the schooner upon which the deceased was steward was owned by a corporation incorporated under the laws of New Jersey, that this made it New Jersey territory for the purposes of this action, and that the decision below might have rested upon this ground. As already shown, however, the decision below did not rest upon this ground. The complaint, which puts the jurisdiction upon a different basis. The bill of exceptions shows that no such claim was made upon the trial. The recorded opinion of the Supreme Court of New Jersey already referred to, shows that a similar claim made in another case was overruled.

In the case at bar the record shows that the claim made under the Federal statute was denied by the State Court, and that the decision in favor of defendant in error proceeded solely upon this ground.

The question thus mooted by plaintiff in error is one of great importance and one that the plaintiff in error would be glad to have considered in this

court. The counsel who makes this brief had the honor of presenting it to this court in a brief filed in "The Montana," 129 U. S. 397 (reported *sub. nom.* Liverpool and G. W. S. Co. *v.* Phenix Ins. Co).

All the steamship companies there joined in the contention that in actions of tort the law of the flag controls. But inasmuch as this court has held, not only in that but in many subsequent cases, that the law of the flag does not govern the decision in actions of tort, it seems hardly worth while to argue this question now.

See S. C., pp. 444, 447. *The Alaska,* 113 U. S., 201.

The case of Crapo *v.* Kelly cited by counsel for defendant in error was one of priority of title. It was held that this would be regulated by the law of the port of registry. But that is entirely different from holding that the law of the port of registry is operative to create a new cause of action in a case of tort on the high seas.

In Rundell *vs.* Compagnie Generale, 100 Fed. 655 the Circuit Court of Appeals in the seventh circuit held that the law of the flag would not entitle the administrator of a person who was drowned in consequence of a collision, in which the "Bourgogne" sank, to bring an action in the courts of this country. It is true that the opinion of the Court in the Lindstrom case referred to in the brief for defendant in error was different, but this case can hardly be cited as an authority, because the libel there was dismissed on another ground.

It is however a well settled rule that this court will not review on a ground not presented below.

Klein *vs.* Russell, 19 Wall., 433.
Badger *vs* Ranlett, 106 U. S., 225.

It is needless therefore further to consider this question.

Twelfth.

The motion should be denied and the cause retained upon the docket.

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